Supreme Court, U.S.
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In The

Supreme Court of the United States

BRADFORD LEE BUTLER, JR.,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a superseding indictment relate back to the date of the original indictment for statute-of-limitations purposes only if it neither substantially broadens nor substantially amends the original charges, as eight circuits have held, or does it relate back so long as it does not substantially broaden the original charges, as the Sixth Circuit has held in this and other cases?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bradford Lee Butler, Jr. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on July 30, 2002.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 297 F.3d 505 and is reproduced at Appendix ("A.") 1a.

JURISDICTION

The District Court's judgment was entered on May 24, 1998. The judgment of the Court of Appeals was entered on July 30, 2002, and a timely petition for rehearing with suggestion for rehearing en banc was denied on November 13, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

26 U.S.C. § 6531, which establishes periods of limitation for criminal prosecutions of offenses arising under the internal revenue laws, is reproduced at A. 31a.

STATEMENT

This case concerns a single count of tax evasion charged in a superseding indictment returned more than six years after the alleged offense. The offense allegedly occurred "[o]n or about the 31st day of January, 1992," A. 30a, but the superseding indictment was not returned until February 26, 1998. A. 3a. The statute of limitations for charges under the tax-evasion statute (26 U.S.C. § 7201) is six years. *See* 26 U.S.C. § 6531(2). Thus, the charge was barred by the statute of limitations unless the superseding indictment related back to the date of the original indictment, which was returned on January 29, 1998. A. 3a.

The pertinent count of the original indictment (Count 2) charged that Kriston Kent Manning and petitioner Bradford Lee Butler, Jr. "conducted businesses known as National Consumer Research, Inc. (hereinafter, 'NCR') and *Data Central*" and attempted to evade taxes by failing to prepare and file an employer's quarterly federal tax return (Form 941) for the fourth quarter of 1991, and by failing to pay the federal income tax withheld and the social security tax due. A. 29a (emphasis added).

The corresponding count of the superseding indictment (also Count 2) substituted an entirely different corporation for Data Central. As in the original indictment, the defendants were charged with attempting to evade taxes by failing to prepare and file a Form 941 for the fourth quarter of 1991, and by failing to pay the federal income tax withheld and the social security tax due. A. 30a. This time, however, they were charged with "conduct[ing] businesses known as National Consumer Research, Inc. (hereinafter, 'NCR') and *Fulfillment Services*

Corp." *Id.* (emphasis added). Fulfillment Services Corp. had not been mentioned anywhere in the original version of Count 2. Similarly, Data Central, which had been at the heart of the original version of Count 2, was completely omitted from the new version of the charge.

Petitioner had been the President of NCR. The government's theory was that, while petitioner had wanted to do everything properly regarding the payment of taxes, he had known that that was not happening and therefore was criminally liable along with Manning.[1]

Petitioner was eventually convicted, pursuant to a guilty plea, on Count 2 of the superseding indictment. The factual statement jointly signed by the government and the defense, which summarized the basis for the plea, reflected the revised theory underlying the superseding indictment, that Fulfillment Services Corp. had been created "to fulfill the role of 'employer' of the employees who carried out the business functions of NCR." Data Central, which had been central to the original version of Count 2, was not mentioned in the factual statement. Petitioner was later sentenced to twelve months' imprisonment.

The Court of Appeals affirmed petitioner's conviction, rejecting his contention that the superseding indictment was barred by the statute of limitations. The court relied

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[1] *See* Tr. of Feb. 17, 1999 at 160 (question propounded to petitioner by the prosecutor) ("I think you did want to do everything properly. You wanted to pay your taxes, you wanted the trust fund concept to be adhered to. I have no doubt about that. But you knew it wasn't happening; didn't you?").

upon its rule that "a superseding indictment relates back to the date of the original indictment if it 'does not broaden the charges set forth' in the original indictment." A. 8a (quoting *United States v. Garcia*, 268 F.3d 407, 411 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 1985 (2002), *overruled on other grounds*, *United States v. Leachman*, 309 F.3d 377 (6th Cir. 2002)).

Petitioner filed a timely petition for rehearing with suggestion for rehearing en banc. The Court of Appeals directed the government to file a response but ultimately denied the petition. A. 27a. The court later stayed the issuance of its mandate for 90 days to afford petitioner an opportunity to seek review in this Court.

REASONS FOR GRANTING THE WRIT

The standard adopted by the Court of Appeals, to determine whether a superseding indictment relates back to the date of the original indictment for statute-of-limitations purposes, is in conflict with the standard adopted by the Courts of Appeals for the First, Second, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits. Certiorari should be granted to resolve this intercircuit conflict on a basic and recurring issue of criminal procedure.

I. The Circuits Are Divided as to When a Superseding Indictment Returned After the Statute of Limitations Otherwise Would Have Expired May Be Deemed Timely on the Theory That It Relates Back to the Date of the Original Indictment.

Eight Circuits have held that a superseding indictment relates back to the date of the original indictment only if it *neither* substantially broadens *nor* substantially amends the original indictment. *See United States v. O'Bryant*, 998 F.2d 21, 23 (1st Cir. 1993) ("[A] superseding indictment which supplants a timely-filed indictment, still pending, is itself to be regarded as timely vis-à-vis a given defendant, so long as it neither materially broadens nor substantially amends the charges against the defendant."); *United States v. Zvi*, 168 F.3d 49, 54-55 (2d Cir. 1999) (reversing convictions because of failure to satisfy the rule that "[a] superseding indictment will relate back to the date of the original indictment only if the superseding indictment does not broaden or substantially amend the original charge." (internal quotation omitted)); *United States v. Oliva*, 46 F.3d 320, 324 (3d Cir. 1995) ("[T]he day on which the original indictment was filed controls for statute of limitation purposes, provided that, as here, the superseding indictment does not materially broaden or substantially amend the charges in the first."); *United States v. Schmick*, 904 F.2d 936, 940 (5th Cir. 1990) ("A superseding indictment filed while the initial indictment is pending is timely unless it broadens or substantially amends the charges made in the original indictment."); *United States v. Ross*, 77 F.3d 1525, 1537 (7th Cir. 1996) ("[A] superseding indictment that supplants a still-pending original indictment relates back to the original indictment's filing date so long as it neither materially

broadens nor substantially amends the charges initially brought against the defendant."); *United States v. Sears, Roebuck & Co.*, 785 F.2d 777, 778 (9th Cir. 1986) ("A superseding indictment returned while the first indictment is pending is timely unless it broaden[s] or substantially amend[s] the charges in the original indictment." (internal quotation omitted) (alterations in original)); *United States v. Davis*, 953 F.2d 1482, 1491 (10th Cir. 1992) ("A superseding indictment filed while the first indictment is validly pending is not barred by the statute of limitations unless it broadens or substantially amends the charges in the first indictment."); *United States v. Ratcliff*, 245 F.3d 1246, 1253 (11th Cir. 2001) (reversing conviction because "the superseding indictment materially broadened or substantially amended" the original indictment).

In this and other cases, the Sixth Circuit has applied a different standard. The Sixth Circuit's standard asks solely whether the superseding indictment materially broadens the charges made in the original indictment. *See* A. 8a; *Garcia*, 268 F.3d at 411; *United States v. Smith*, 197 F.3d 225, 228-29 (6th Cir. 1999); *United States v. Lash*, 937 F.2d 1077, 1081-82 (6th Cir. 1991). Under the Sixth Circuit's standard, if the superseding indictment does not materially broaden the charges, then it relates back, regardless of whether it substantially amends the charges.

This Court should decide what the correct standard is. The scope of the judge-made exception to criminal limitations statutes, whereby a superseding indictment that otherwise would be time-barred is deemed to relate back to the date of the original indictment, is a matter of broad importance. The exception can be at issue in any kind of criminal prosecution, from an antitrust case to an obscenity

case. Moreover, it is not unusual for a prosecutor to obtain a superseding indictment long after the return of the original indictment.[2]

II. The Sixth Circuit's Standard Undermines the Important Purposes Served by Criminal Statutes of Limitations.

For several reasons, the standard adopted by eight other circuits, rather than the standard adopted by the Sixth Circuit, is the correct one.

First, not to ask whether a superseding indictment substantially amends the original indictment, in determining whether it relates back to the filing of the original indictment, is at odds with the "long-standing congressional 'policy of repose' that is fundamental to our society and our criminal law." *Bridges v. United States*, 346 U.S. 209, 215-16 (1953). In keeping with that fundamental policy, this Court has repeatedly declared that "criminal limitations statutes are to be *liberally interpreted in favor of repose.*" *Toussie v. United States*, 397 U.S. 112, 115 (1970) (quotations omitted) (emphasis added); *see United States v. Marion*, 404 U.S. 307, 322 n.14 (1971); *United States v.*

[2] *See, e.g.*, *United States v. LaSpina*, 299 F.3d 165, 172 (2d Cir. 2002) (interval of more than one year and three months); *O'Bryant*, 998 F.2d at 23 (interval of more than nine months); *Davis*, 953 F.2d at 1490-91 (same).

Habig, 390 U.S. 222, 227 (1968); *Bridges*, 346 U.S. at 216; *United States v. Scharton*, 285 U.S. 518, 522 (1932).

Legislation limiting the time for bringing a criminal prosecution not only implements the policy of repose but also "protect[s] individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time." *Toussie*, 397 U.S. at 114. "With the passage of time memories fade, witnesses die or leave the area, and physical evidence becomes more difficult to obtain, identify, or preserve. In short, possibility of erroneous conviction is minimized when prosecution is prompt." MODEL PENAL CODE AND COMMENTARIES § 1.06, at 86 (1985). "Statutes of limitations are intended to ensure, *inter alia*, that a defendant receives notice, within a prescribed time, of the acts with which he is charged, so that he and his lawyers can assemble the relevant evidence before documents are lost, memory fades, etc." *United States v. O'Neill*, 463 F. Supp. 1205, 1208 (E.D. Pa. 1979) (Pollak, J.). Such statutes "provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." *Marion*, 404 U.S. at 322.

In light of the principle that criminal limitations statutes are to be liberally interpreted in favor of repose, as well as the important purposes served by such statutes, the relation-back doctrine should not extend to superseding indictments that substantially alter the charges against which the accused must defend. Plainly, an indictment may be altered in ways that implicate the purposes of criminal limitations statutes, without its being broadened. For example, in a case involving an alleged false statement to a government agency, one statement may be

substituted for another. The second indictment is not broader – each charge involves a single statement – but the charge may well have been materially altered. And certainly the delay in charging an offense based on the substituted statement may prejudice the defendant. During the period between the two indictments, "basic facts" that bear on the truth of the statement, or on the defendant's knowledge when he made it, "may have become obscured by the passage of time." *Toussie*, 397 U.S. at 114.

Second, Congress expressly provided a procedure that prosecutors may use when they are uncertain about how they wish to frame an indictment concerning a tax offense. The penultimate sentence of 26 U.S.C. § 6531 provides:

> Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the commissioner of the United States.

This provision offers a ready means of obtaining an additional nine-month period to refine a charge alleging a tax offense, although to invoke it the government must meet certain requirements.[3] Particularly because Congress

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[3] "[T]he complaint, to initiate the time extension, must be adequate to begin effectively the criminal process prescribed by the Federal Criminal Rules." *Jaben v. United States*, 381 U.S. 214, 220 (1965). Thus, "the complaint must satisfy the probable cause requirement of Rule 4." *Id.* In addition, "the government must proceed through the further steps of the complaint procedure by affording the defendant a preliminary hearing as required by Rule 5, unless before the preliminary hearing is

(Continued on following page)

specified a procedure for obtaining more time to refine a tax charge, courts should not stretch the relation-back doctrine to create an alternative procedure. "*Expressio unius est exclusio alterius.*" *Leatherman v. Tarrant County Narcotics & Intelligence Coordination Unit*, 507 U.S. 163, 168 (1993); *see TRW Inc. v. Andrews*, 534 U.S. 19, 28-29 (2001) (applying this maxim in construing a civil statute of limitations); *United States v. Brockamp*, 519 U.S. 347, 352 (1997) (relying in part on Congress's "explicit listing of exceptions" in holding that "Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote" to govern the time for filing tax refund claims).

Third, if prosecutors could wait until the end of the limitations period to bring charges, knowing that a later superseding indictment would relate back to the date of the initial indictment even if it substantially altered the charges, there would be consequences that Congress could not have intended and that would be detrimental to the fair administration of the criminal law. A standard permitting such maneuvers would invite hastily-drafted, ill-considered indictments, since errors could simply be corrected later. Inevitably, out of a large number of last-minute indictments drafted with the expectation that they would be superseded, a significant percentage would do substantial harm. "[T]he handing up of an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo." *United States v. Serubo*, 604 F.2d 807, 817 (3d Cir. 1979). The

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held, the grand jury supersedes the complaint procedure by returning an indictment." *Id.*

return of an indictment may expose the defendant to public embarrassment and ridicule,[4] and before he has any chance to present a defense it may cost him his job and even his liberty. Any standard that invites prosecutors to obtain indictments in haste and without careful and deliberate consideration of their contents is bound to cause needless injury to innocent citizens.

The facts of this case illustrate the mischief created by the Court of Appeals' unique standard. The charges involved alleged failure to pay over to the IRS (and file returns accounting for) income and social security tax on employee wages. By statute, it is the employer that is responsible for paying over and accounting for such taxes. Count 2 of the original indictment clearly was predicated on the assumption that Data Central was the employer obligated to pay over and account for the taxes. A. 29a. Count 2 of the superseding indictment was just as clearly predicated on the assumption that a completely different corporation, Fulfillment Services Corp., was the employer. A. 30a.[5] That was a fundamental transformation of the charge. Yet under the Court of Appeals' standard, the new charge related back to the date of the original indictment – and would have related back regardless of how many months or even years had elapsed between the two indictments.

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[4] *See United States v. Briggs*, 514 F.2d 794, 805 (5th Cir. 1975) ("An indictment, the formal act of an impartial, formally convened quasi-judicial body of historical status and power, carries more impact on the reputation of its subject than does trial testimony.").

[5] Both Data Central and Fulfillment Services Corp. were real business organizations. *See* Superseding Indictment, ¶¶ 2-4.

In this case, the Court of Appeals' standard allowed the government, after the limitations period otherwise would have expired, to replace a charge on which petitioner would have been entitled to a judgment of acquittal. As the government had determined by the time it sought the superseding indictment, Data Central – the alleged employer in the original version of Count 2 – had no employees. There were thus no Data Central employees as to whom petitioner could have failed to pay taxes as charged in the original indictment. If the government had gone to trial on Count 2 as originally framed, Butler would have been entitled to a judgment of acquittal. That is why when the government obtained the superseding indictment more than six years after the alleged offense, it did not merely modify the allegation in Count 2 about Data Central but instead completely omitted Data Central from the charge. Under the Court of Appeals' erroneous standard, the government was allowed to do exactly that, without regard to Congress's judgment that tax-evasion charges should be brought within six years of the offense. The Court of Appeals' decision frustrates Congress's intent and should be overturned.

CONCLUSION

A writ of certiorari should be granted.

Respectfully submitted.

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February 10, 2003

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A.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES of America, Plaintiff-Appellee,

v.

Bradford Lee BUTLER, Defendant-Appellant.

No. 99-3867.

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 98-00025 – Algenon L. Marbley, District Judge.

Argued: Dec. 6, 2001.
Decided and Filed: July 30, 2002.

Before: MOORE and COLE, Circuit Judges;
O'MEARA, District Judge.*

COUNSEL

ARGUED: James R. Alsup, Chula Vista, California, for Appellant. Daniel Allen Brown, ASSISTANT UNITED STATES ATTORNEY, Columbus, Ohio, for Appellee.

ON BRIEF: William Yesowitch, BARBER, BANASZYNSKI & ASSOCIATES, Louisville, Kentucky, for Appellant.

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* The Honorable John Corbett O'Meara, United States District Judge for the Eastern District of Michigan, sitting by designation.

Daniel Allen Brown, ASSISTANT UNITED STATES ATTORNEY, Columbus, Ohio, for Appellee.

MOORE, J., delivered the opinion of the court, in which O'MEARA, D. J., joined. COLE, J., delivered a separate concurring opinion.

OPINION

KAREN NELSON MOORE, Circuit Judge. Defendant-Appellant Bradford Lee Butler pleaded guilty to one count of tax evasion in violation of 26 U.S.C. § 7201. On appeal, Butler claims that the district court erred by accepting his guilty plea to a count in the indictment that fell outside of the statute of limitations, denying his motion to dismiss the superseding indictment on the basis of the government's alleged breach of an agreement not to prosecute him, and denying his motion to withdraw his guilty plea on the basis of the government's alleged breach of the plea agreement. In addition, Butler challenges the district court's enhancement of his sentence for the use of sophisticated means, the court's failure to consider a split sentence, and the court's imposition of restitution in an amount to be determined by the Tax Court or the IRS. For the following reasons, we **AFFIRM** the district court's judgment in all respects, except that we **VACATE** the district court's order regarding the amount of restitution and we **REMAND** for further proceedings consistent with this opinion.

I. BACKGROUND

The undisputed facts of this case are set forth in an attachment to Butler's plea agreement. Butler established and operated two businesses, National Consumer Research ("NCR"), of which he was president, and Fulfillment Services Corp. ("FSC"). Butler represented to the Internal Revenue Service ("IRS") that NCR leased its employees from FSC. Butler used payroll services companies to pay the NCR/FSC employees, and the employees' checks showed the deduction of federal taxes. Instead of paying the deducted amounts to the federal government, however, Butler retained the money, and he also failed to file the employer tax return form as required by federal law. On January 29, 1998, a federal grand jury in the Southern District of Ohio returned an indictment against Butler for one count of conspiracy to impede or obstruct the IRS in ascertaining and collecting employment taxes in violation of 18 U.S.C. § 371 and five counts of employment tax evasion in violation of 26 U.S.C. § 7201.[1] On February 26, 1998, the same grand jury returned a superseding indictment, adding information about FSC to some of the counts.

On March 6, 1998, Butler was arraigned, and, initially, he entered pleas of not guilty to the six counts charged against him in the superseding indictment. A

[1] Butler was indicted with his business partner, Kriston Kent Manning. Manning was charged with one count of conspiracy to impede or obstruct the IRS in ascertaining and collecting employment taxes in violation of 18 U.S.C. § 371 and twelve counts of employment tax evasion in violation of 26 U.S.C. § 7201. Manning has fled the United States and remains a fugitive.

number of pre-trial motions were filed, including a motion by Butler to dismiss the superseding indictment on the ground that the government had breached an agreement not to prosecute him. On September 15, 1998, the district court held a hearing on the motion to dismiss. At the hearing, Butler's former attorney and the attorney's paralegal testified that at a meeting in Washington, D.C. on October 18, 1995, the government agreed not to prosecute Butler in exchange for his cooperation in locating and convicting Manning and the payment of his personal income taxes. According to Butler's attorney and the paralegal, this agreement was confirmed in subsequent telephone conversations, although both conceded that there is no documentary evidence of such an agreement. Government witnesses testified that the meeting occurred, but they denied that the government attorney with whom Butler's attorney and the paralegal met ever agreed not to prosecute Butler; in fact, the government attorney testified that she did not have the authority to make such an agreement. The district court found that there was no agreement, specifically noting that "the oral testimony coming from defense witnesses as to an agreement are patently unbelievable," and it denied Butler's motion to dismiss. Joint Appendix ("J.A.") at 415-19 (Mot. to Dismiss Indictment Hearing Tr.).

Following the denial of his motion to dismiss the superseding indictment, Butler signed an agreement with the government to plead guilty to the second count of the superseding indictment charging him with tax evasion in

violation of 26 U.S.C. § 7201.[2] Pursuant to the 1991 Sentencing Guidelines,[3] and based on a tax loss amount of $179,454.97 (the total tax loss to the IRS from both Butler and Manning), the presentence investigation report recommended that Butler be sentenced to twelve months of imprisonment, a fine of $3,000, restitution to be determined by the Tax Court, and a special assessment of $50. The report also recommended a two-level enhancement for the use of sophisticated means and a two-level reduction for acceptance of responsibility. In February 1999, the district court held a hearing on objections to the report. Based on the government's arguments at the hearing and in its post-hearing memorandum, Butler moved on May 5, 1999, to withdraw his guilty plea on the ground that the government had breached the plea agreement.

On May 7, 1999, the district court held a sentencing hearing, at which it also heard Butler's motion to withdraw his guilty plea. Finding that the government had not breached the plea agreement, the district court denied Butler's motion to withdraw his guilty plea. The court also approved the presentence report's enhancement and reduction recommendations. However, the court agreed – with both Butler and the government – that the appropriate amount of tax loss was $69,558 as opposed to $179,454.97. Based [sic] the lower tax loss amount, the

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[2] Pursuant to Federal Rule of Criminal Procedure 11(a)(2), Butler entered the plea on the condition that he could appeal the denial of his motion to dismiss the superseding indictment.

[3] All references to the United States Sentencing Guidelines and the Commentary to the Guidelines in this opinion are to the 1991 version, because the district court relied on that version in sentencing Butler.

court then sentenced Butler to twelve months of imprisonment, three years of supervised release following the imprisonment, a fine of $3,000, restitution to be determined by the Tax Court or the IRS, and a special assessment of $50.[4] Butler timely appeals.[5]

II. ANALYSIS

A. Statute of Limitations to Count 2 of the Superseding Indictment

Butler pleaded guilty to tax evasion in violation of 26 U.S.C. § 7201. The statute of limitations period for prosecuting violations of 26 U.S.C. § 7201 is six years. 26 U.S.C. § 6531. Butler claims that the "operative date of violation" of Count 2 was December 31, 1991; therefore, as the superseding indictment was returned on February 26, 1998, he argues that the district court should not have been able to accept his guilty plea to Count 2 because the statute of limitations for prosecuting the offense in Count 2 had run.

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[4] Pursuant to U.S.S.G. § 2T4.1(F), a tax loss amount of more than $40,000 warrants a base offense level of 11; the recommended two-level enhancement and reduction to Butler's base offense level cancel one another out. As Butler's Criminal History Category was I, he was sentenced within an eight-to-fourteen-month range.

[5] On January 18, 2000, Butler filed a petition for a writ of habeas corpus or in the alternative a motion to set aside the conviction and sentence under 28 U.S.C. § 2255 in the district court, suspending his direct appeal pending the outcome of the petition. Butler alleged ineffective assistance of counsel and failure of the United States to exhaust its administrative remedies. The district court denied both the petition and a certificate of appealability; this court also denied a certificate of appealability.

We conclude that the district court properly accepted Butler's guilty plea to Count 2 of the superseding indictment because the statute of limitations had not yet run on the offense described in that Count. Count 2 of the superseding indictment states that:

> On or about the 31st day of January 1992, in the Southern District of Ohio, KRISTON KENT MANNING and BRADFORD LEE BUTLER, JR., defendants, who conducted businesses known as National Consumer Research (hereinafter, "NCR") and Fulfillment Services Corp. that were established in Columbus, Ohio, and with business operations then in Columbus, Ohio, did willfully attempt to evade and defeat federal income taxes withheld from wages and Federal Insurance Contributions Act taxes due and owing to the United States of America for the quarter ending December 31, 1991, by failing to file with the Internal Revenue Service an Employer's Quarterly Federal Tax Return, Form 941, and by failing to pay the amount of federal income tax withheld and social security taxes due and owing . . .

J.A. at 32 (Superseding Indictment). We have held that the statute of limitations begins to run for tax evasion under 26 U.S.C. § 7201 on the date of "the last affirmative act of evasion." *United States v. Dandy*, 998 F.2d 1344, 1356 (6th Cir. 1993), *cert. denied*, 510 U.S. 1163 (1994). The date Butler cites as the operative date of violation – December 31, 1991 – is not the date of the last affirmative act of evasion. December 31, 1991, was the day the winter quarter of 1991 ended; the taxes for that quarter were not

even due until January 31, 1992. Therefore, at the very earliest, January 31, 1992, is the date of the last affirmative act of evasion.[6]

Moreover, Butler calculates the date of prosecution as the date the superseding indictment was entered – February 26, 1998. However, this court has held that a superseding indictment relates back to the date of the original indictment if it "does not broaden the charges set forth" in the original indictment. *United States v. Garcia*, 268 F.3d 407, 411 (6th Cir. 2001), *cert. denied*, No. 01-9762, 2002 WL 754021 (U.S. May 20, 2002). In *Garcia*, this court concluded that the addition of drug quantities in a superseding indictment did not "materially broaden the charges already pending against the defendants," because the defendants had sufficient notice of the drug quantities. *Id.* at 416. Similarly, in a fraud conspiracy case, *United States v. Lash*, we held that a superseding indictment was not materially broadening because:

> The dates of the conspiracy remain the same, as do the names of the conspirators and the nature and offices of the operations alleged. The allegation of additional underlying details in a superseding indictment does not compel a conclusion that the charge had been broadened. The original indictment clearly put the defendants on notice

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[6] In *Dandy*, we held that the filing of the defendant's tax returns did not necessarily constitute the last affirmative act of evasion. We explained that because "defendant's evasive acts in 1985 prevented the IRS from learning about defendant's income tax fraud occurring in 1982 and 1983," such acts constituted affirmative acts of evasion for the 1982 and 1983 tax years. *Dandy*, 998 F.2d at 1355.

> of the charges against which they were to defend themselves at trial.

United States v. Lash, 937 F.2d 1077, 1081-82 (6th Cir. 1991) (quotation omitted), cert. denied, 502 U.S. 949 (1991) and 502 U.S. 1061 (1992). In this case, the only change to Count 2 between the original indictment and the superseding indictment was the substitution of FSC for another company, Data Central. This substitution simply constitutes "underlying detail" – both companies were alleged to have performed the same role in the tax evasion. Thus, Butler clearly had notice of the charges against him in the first indictment. As the superseding indictment relates back to the original indictment, the date of prosecution is January 29, 1998. This date is within – albeit by three days – the six-year statute of limitations period beginning January 31, 1992.

B. Motion to Dismiss the Superseding Indictment

Butler moved to dismiss the superseding indictment on the ground that the government breached an informal agreement not to prosecute him. The district court denied the motion, finding that no such agreement existed, and Butler properly preserved the issue for appeal. "To secure a defendant's cooperation in a criminal investigation, the government may informally grant him immunity in exchange for his testimony. An agreement not to prosecute is contractual in nature, and subject to contract law standards." *United States v. Fitch*, 964 F.2d 571, 574 (6th Cir. 1992) (citation omitted). As with plea agreements, therefore, we review for clear error the district court's factual determination regarding the content of an agreement not to prosecute, and we review de novo the district court's legal determination whether certain conduct

violated the agreement. *United States v. Wells*, 211 F.3d 988, 995 (6th Cir. 2000). Because the district court denied Butler's motion to dismiss the superseding indictment on the basis of its finding that an agreement not to prosecute Butler did not exist – a factual determination, we review the district court's denial of Butler's motion to dismiss the superseding indictment for clear error. *See United States v. Suarez*, 263 F.3d 468, 476 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 1547 (2002) (applying the same standard of review to a district court's denial of a motion to dismiss an indictment for prosecutorial vindictiveness as applies in prosecutorial misconduct cases).[7]

The district court found that there was no agreement between the government and Butler not to prosecute

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[7] We have stated that we generally review a district court's refusal to dismiss an indictment for abuse of discretion. *See, e.g., United States v. Middleton*, 246 F.3d 825, 841 (6th Cir. 2001) (citing *United States v. Powell*, 823 F.2d 996, 1001 (6th Cir.), *cert. denied*, 484 U.S. 969 (1987)). However, where a district court's refusal to dismiss an indictment is determined by its conclusion regarding another claim as in *Suarez*, we have applied the same standard of review to the district court's refusal to dismiss the indictment as we apply to the claim alleged as the basis for dismissal. *See, e.g., United States v. Wright*, 260 F.3d 568, 570 (6th Cir. 2001) (applying de novo review to a district court's denial of a motion to dismiss an indictment for destruction of potentially exculpatory evidence) (citing *United States v. Jobson*, 102 F.3d 214, 217 (6th Cir. 1996)); *see also United States v. Plummer*, 941 F.2d 799, 802-03 (9th Cir. 1991) (discussing the relationship between the standard of review applied to motions to dismiss indictments and that applied to the claim on which the motion to dismiss the indictment is based). Because in this case the district court's denial of Butler's motion to dismiss the indictment was determined by its finding that an agreement not to prosecute Butler did not exist, we apply the same standard of review to the court's denial of the motion as we apply to the court's factual determination regarding an agreement not to prosecute.

Butler; therefore, the district court concluded that the government could not have violated any such agreement. Butler was unable to produce any documentary evidence of the alleged agreement, and the district court found the only witnesses who attested to the existence of the agreement not to be credible. Unless it has no foundation, we defer to a district court's finding of credibility. *United States v. Owusu*, 199 F.3d 329, 339 (6th Cir. 2000). We thus conclude that it was not clear error for the district court to find that there was no agreement by the government not to prosecute Butler, and we agree with the district court that if no agreement existed, the government could not have breached it. Butler's motion to dismiss the superseding indictment was properly denied.

C. Motion to Withdraw Guilty Plea

Butler claims on appeal that the district court erred in denying his motion to withdraw his guilty plea, because the government breached the plea agreement in a number of ways. According to Butler, the government: (1) used incriminating information provided by Butler to argue for two two-level enhancements of Butler's base offense level in violation of Paragraph 4 of the plea agreement; (2) contested a two-level reduction of Butler's base offense level for acceptance of responsibility in violation of Paragraph 9 of the plea agreement; and (3) failed to move for a downward departure from the guidelines range in Butler's sentence, even though Butler substantially assisted in the

government's investigation and prosecution of Manning in violation of Paragraph 14 of the plea agreement.[8]

The district court, after reviewing all the above claims at Butler's sentencing hearing, found that the government had not breached the plea agreement and therefore denied Butler's motion to withdraw his guilty plea. We review the district court's decision to deny Butler's motion to withdraw his guilty plea for abuse of discretion. *United States v. Pluta*, 144 F.3d 968, 973 (6th Cir.), *cert. denied*, 525 U.S.

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[8] Butler also contends that it was his understanding that the plea agreement was for a tax loss amount of $17,652 – not $69,558. However, Paragraph 8 of the plea agreement explicitly states that: "The parties further agree that the amount of loss suffered by the victim, the United States of America, for criminal tax purposes is calculated to be $69,558.00. . . . " J.A. at 130 (Plea Agreement). We have held that "[a]n integration clause normally prevents a criminal defendant, who has entered into a plea agreement, from asserting that the government made oral promises to him not contained in the plea agreement itself." *United States v. Hunt*, 205 F.3d 931, 935 (6th Cir. 2000). The plea agreement in this case contained such an integration clause. J.A. at 133 (16).

Moreover, although Count 2 in the original indictment did state $17,652 as the amount of tax loss for that count, Butler could have been held accountable for sentencing purposes for the amount of tax loss incurred as "part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2); U.S.S.G. § 2T1.1 commentary, applic. note 3 ("In determining the total tax loss attributable to the offense (*see* § 1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated."). The combined tax loss of all the counts charged against Butler in the superseding indictment totals $69,558, and thus even if Butler had not agreed to this amount in the plea agreement, it would have been an appropriate amount of tax loss from which to determine Butler's sentencing range if found by a preponderance of the evidence by the district court. *See also United States v. Daniel*, 956 F.2d 540, 544 (6th Cir. 1992).

916 (1998). Federal Rule of Criminal Procedure 32(e) provides that "[i]f a motion to withdraw a plea of guilty . . . is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason." Had the government breached the plea agreement, we have held that "the proper remedy may be either specific performance or permitting the defendant to withdraw his plea." *Peavy v. United States*, 31 F.3d 1341, 1346 (6th Cir. 1994). As noted above, we review for clear error the district court's determinations regarding the content of the plea agreement, and we review de novo the district court's determination that the government's conduct did not breach the plea agreement. *Wells*, 211 F.3d at 995.

Butler claims that he met with law enforcement authorities on December 17, 1998, pursuant to Paragraph 4 of the plea agreement, and provided them with information that the government then used in arguing for two two-level enhancements of his base offense level in violation of that paragraph. Paragraph 4 of the plea agreement stated that:

> Pursuant to § 1B1.8 of the Federal Sentencing Guidelines, the government agrees that any self-incriminating information so provided will not be used against the defendant in determining the applicable guideline range for sentencing, or as a basis for upward departure from the guideline range.

J.A. at 128 (Plea Agreement).[9] At the sentencing hearing, however, the government claimed that "every single piece of evidence that was used relative to sentencing was in the file of the United States Attorney and the IRS prior to [the meeting]. In fact, it was in the file prior to the return of the Superseding Indictment in this case." J.A. at 704 (Sentencing Hearing Tr.).

First, the government argued that Butler's base offense level should be enhanced by two levels for use of "sophisticated means" pursuant to U.S.S.G. §2T1.1(b)(2), as recommended in the presentence investigation report. The government claimed that "Butler kept the money concealed from the IRS behind another business entity name, used post office 'drop' boxes and aliases, and successfully put off agents through incomplete referrals and presentation of tax protestor defenses." J.A. at 158 (Pl.'s Post-Hearing Mem. re Sentencing Issues). The fact that Butler concealed money from the IRS was clearly available to the government prior to the post-plea meeting. In addition, Fred Richardson, Butler's business partner's bookkeeper and the government's informant in this case,

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[9] U.S.S.G. §1B1.8(a) provides that:

> Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.

See also United States v. Miller, 910 F.2d 1321, 1325 (6th Cir. 1990), *cert. denied*, 498 U.S. 1094 (1991).

testified to all of the other facts at the sentencing objections hearing on February 25, 1999, and he referenced particular pieces of evidence likely to be in his knowledge or possession prior to Butler's post-plea meeting with the government. Second, the government argued that Butler's base offense level should be enhanced by two levels for willful obstruction pursuant [sic] U.S.S.G. § 3C1.1 because Butler "repeatedly lied and cast blame upon others." J.A. at 158-59. As in its argument for the sophisticated means enhancement, the government in making its willful obstruction argument relied on three sources of facts: the facts to which Butler stipulated in pleading guilty to Count 2, Richardson's testimony, and the experience of IRS agents. Such facts were likely in the possession of the government prior to Butler's post-plea meeting with law enforcement authorities. We therefore agree with the district court that the government did not breach the plea agreement by arguing for the sophisticated means and obstruction of justice enhancements.

Butler also claims that the government violated the plea agreement by contesting a two-level reduction of his base offense level for acceptance of responsibility and by failing to move for a downward departure from his guidelines range for substantial assistance. In regard to the reduction, the plea agreement explicitly conditioned the government's support of the reduction on the defendant's continued acceptance of responsibility.[10] The district court

[10] Paragraph 9 of the plea agreement provided that:

> The parties further agree that pursuant to U.S.S.G. §3E1.1, at the time of his plea, the Defendant BRADFORD LEE BUTLER, JR., has accepted responsibility for his offense,

(Continued on following page)

did eventually apply the reduction, but it was at least reasonable for the government to argue that Butler failed to accept responsibility for his 1991-92 act of tax evasion when he testified that he had no knowledge of the failure of NCR to pay its employment taxes until 1992 and that he cooperated with the IRS as soon as he learned of the problem. In regard to the downward departure, the plea agreement stipulated that the government "may" move the court for a downward departure for substantial assistance, but that such motion lay within the discretion of the government.[11] Thus the government in not moving for a downward departure for substantial assistance was acting

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and therefore is entitled to an appropriate reduction, being 2 points, in the applicable base offense level under the sentencing guidelines. At the time of sentencing, the United States will not object to this same determination provided defendant's conduct has continued to demonstrate compliance with the terms of U.S.S.G. § 3E1.1. . . .

J.A. at 130.

[11] Paragraph 14 of the plea agreement provided that:

The United States Attorney for the Southern District of Ohio agrees that if Defendant BRADFORD LEE BUTLER, JR., provides substantial assistance in the investigation or prosecution of others who have committed criminal offenses, the United States Attorney may move the Court pursuant to U.S.S.G. §3553(e) and/or §5K1.1 of the United States Sentencing Guidelines for an appropriate departure from the otherwise applicable guideline range for Defendant's sentence and will in connection therewith make known to the Court the nature and extent of Defendant's assistance. Defendant understands that whether such motion should be made lies within the discretion of the United States Attorney and that whether and to what extent such motion should be granted are solely matters for determination by the Court.

J.A. at 132.

within its discretion under the plea agreement. We therefore also agree with the district court that the government did not breach the plea agreement by contesting the two-level reduction for acceptance of responsibility or failing to move for downward departure for substantial assistance.

Because we agree with the district court that the government did not breach the plea agreement, we further conclude that the district court did not abuse its discretion in denying Butler's motion to withdraw his guilty plea.

D. Sentencing

Butler challenges the district court's determination of his sentence in three respects: (1) the district court's application of a two-level enhancement for use of sophisticated means to Butler's base offense level; (2) the district court's failure to consider a split sentence; and (3) the district court's imposition of restitution in an amount to be determined by the Tax Court or the IRS. We review de novo the district court's interpretation of the Sentencing Guidelines, and we review the district court's findings of fact at sentencing for clear error. *United States v. Canestraro*, 282 F.3d 427, 431 (6th Cir. 2002). In addition, we review de novo the district court's application of the facts to the Sentencing Guidelines, because such application involves a mixed question of law and fact. *United States v. Middleton*, 246 F.3d 825, 844 (6th Cir. 2001). Therefore, "[t]he determination that a tax evasion scheme used sophisticated means generally enjoys the protection of the clearly erroneous standard, except that we review the application of the guideline to a particular set of facts *de novo*." *United States v. Pierce*, 17 F.3d 146, 151 (6th Cir. 1994). And "[w]e review de novo whether a restitution

order is permitted under the law. If it is, we then review the amount ordered under the abuse of discretion standard." *United States v. Comer*, 93 F.3d 1271, 1278 (6th Cir.), *cert. denied*, 519 U.S. 1033 (1996).

1. Sophisticated Means Enhancement

The district court applied a two-level enhancement to Butler's base offense level for use of sophisticated means in impeding "discovery of the nature or extent" of a tax evasion offense, pursuant to U.S.S.G. § 2T1.1(b)(2). The Commentary to the Guidelines explains that: "'Sophisticated means,' as used in § 2T1.1(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied, for example, where the defendant used offshore bank accounts, or transactions through corporate shells." U.S.S.G. § 2T1.1(b)(2) commentary, applic. note 6. In overruling Butler's objection to the enhancement, the district court stated that "[i]t appears to the Court that there was a fairly elaborate scheme employed here and that Mr. Butler took part of [sic] that scheme. He used post office drop boxes, aliases, put out some of the incomplete referrals." J.A. at 711 (Sentencing Hearing Tr.). We have held that the sophisticated means enhancement requires the sentencing court to look at the actions taken by the individual. *United States v. Kraig*, 99 F.3d 1361, 1371 (6th Cir. 1996). In particular, "[a] defendant involved in a complex or repetitive tax conspiracy is not automatically given a sophisticated means enhancement if his or her own personal involvement did not constitute sophisticated means." *Id.*

On appeal, Butler argues that he was simply involved in a complex scheme of tax evasion set up by his business partner, Manning. However, the evidence presented by the government at the sentencing objections hearing demonstrated that Butler's personal involvement in the scheme constituted sophisticated means. First, as opposed to the defendant in *Kraig*, Butler himself helped set up the shell companies Data Central and FSC, and he was president of NCR. Second, although Butler may not have set up the various different bank accounts or post office boxes, he used them in his day-to-day business at NCR – he was not just occasionally involved in the scheme. Third, according to Richardson, Butler did use an alias. And, finally, Richardson and IRS agents provided evidence that Butler tried to mislead the IRS. In other words, "[t]his was not a case of an individual who simply lied on a 1040 form." *Pierce*, 17 F.3d at 151. We therefore conclude that the district court properly applied the two-level sophisticated means enhancement to Butler's base offense level.

2. Split Sentence

Butler argues that the district court overlooked the possibility that Butler's sentence could be "split" under U.S.S.G. § 5C1.1(d). U.S.S.G. § 5C1.1(d) provides that:

> If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is more than six months but not more than ten months, the minimum term may be satisfied by (1) a sentence of imprisonment; or (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in § 5C1.1(e), provided

> that at least one-half of the minimum term is satisfied by imprisonment.

Because his base offense level was set at 11 and his Criminal History Category was I, Butler's sentencing guideline range was eight to fourteen months, and thus he could have received a "split sentence" under § 5C1.1(d). U.S.S.G. § 5C1.1(d) commentary, applic. note 4; *see also United States v. Cseplo*, 42 F.3d 360, 361-62 (6th Cir. 1994). Butler did not raise any objection to the district court's failure to apply the split-sentence guideline at the sentencing hearing; therefore, this court may only review the district court's failure to apply the guideline for plain error. *United States v. Koeberlein*, 161 F.3d 946, 949 (6th Cir. 1998), *cert. denied*, 526 U.S. 1030 (1999); *United States v. Barajas-Nunez*, 91 F.3d 826, 830 (6th Cir. 1996).

"Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. R. Crim. P. 52(b). For a challenge to be successful under plain error review, "there must be (1) error, (2) that is plain, (3) and that affects[s] substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *United States v. Roper*, 266 F.3d 526, 531 (6th Cir. 2001) (quoting *Johnson v. United States*, 520 U.S. 461, 467 (1997)). As U.S.S.G. § 5C1.1(d) gives the district court the discretion to sentence certain defendants either to a term of imprisonment or to a "split" term of imprisonment and community confinement or home detention, the district court's failure to sentence Butler to a "split" term cannot constitute error much less plain error.

3. Restitution

The district court sentenced Butler to make restitution to the IRS in an amount "To be determined thru tax court or IRS." J.A. at 43 (Judgment). Butler argues on appeal that the district court erred by failing to specify the amount of restitution, and, furthermore, that the district court did not have the authority to order restitution under the Victim and Witness Protection Act (VWPA), as codified at 18 U.S.C. §§ 3663, 3664 (1994).[12] Because Butler did not object to the imposition of restitution at the sentencing hearing, this court must review such imposition for plain error. *United States v. Hall*, 71 F.3d 569, 573 (6th Cir. 1995).

Butler correctly points out that the VWPA does not apply to Title 26 offenses such as tax evasion. 18 U.S.C. § 3663(a)(1). However, the district court did not order Butler to make restitution under the VWPA; the district court ordered Butler to make restitution as a condition of supervised release under 18 U.S.C. §§ 3563(b)(3), 3583(d) (1994). The presentence investigation report recommended that restitution to the IRS be ordered as a condition of probation or supervised release under 18 U.S.C.

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[12] This court has held that "restitution imposed under the VWPA is punishment for the purpose of the Ex Post Facto Clause." *United States v. Schulte*, 264 F.3d 656, 662 (6th Cir. 2001) (citing *United States v. Streebing*, 987 F.2d 368, 376 (6th Cir.), *cert. denied*, 508 U.S. 961 (1993)). Therefore, we apply the version of the VWPA in effect at the time Butler committed the offenses for which he is required to make restitution. *See* 18 U.S.C. §§ 3663, 3664 (1994). We also note that the 1996 amendment to the VWPA – the Mandatory Victims Restitution Act ("MVRA"), codified at 18 U.S.C. § 3663A (Supp. V), – does not apply. *See Schulte*, 264 F.3d at 662.

§§ 3563(b)(3), 3583(d), and the district court adopted this recommendation. 18 U.S.C. §§ 3563(b)(3) states that district courts may provide that a defendant "make restitution to a victim of the offense" as a condition of probation. 18 U.S.C. § 3583(d) extends the possibility of such provision to supervised release. Therefore, we conclude that the district court had authority to order Butler to make restitution to the IRS.

More problematic, however, is the district court's order of restitution in an amount "To be determined thru tax court or IRS." J.A. at 43. Although the district court had authority to order Butler to make restitution pursuant to 18 U.S.C. §§ 3563(b)(3), 3583(d), not pursuant to the VWPA, such restitution was required nonetheless to conform to the provisions of the VWPA. *See Gall v. United States*, 21 F.3d 107, 111 (6th Cir. 1994) ("We have already concluded that the restitution provision, 18 U.S.C. § 3583(d), via its reference to 18 U.S.C. § 3563(b)(3), requires restitution to conform with provisions of the VWPA, notwithstanding the limitations set forth in § 3663(a).").[13] Under the VWPA, a district court may not delegate the determination of the amount of restitution. At

[13] 18 U.S.C. § 3563(b)(3) (1994) states that: "[The court may provide that the defendant] make restitution to a victim of the offense under sections 3663 and 3664 (but not subject to the limitations of section 3663(a)). . . ." As noted above, the VWPA is codified at 18 U.S.C. §§ 3663, 3664. Therefore, although the district court had authority to order restitution under 18 U.S.C. § 3563(b)(3) in a case in which the defendant pleaded guilty to an offense other than those offenses listed in 18 U.S.C. § 3663(a)(1), the rest of the VWPA as codified in 18 U.S.C. §§ 3663, 3664 still applies. *See Gall*, 21 F.3d at 109-110.

issue is the district court's abrogation of its judicial authority; as the Fourth Circuit has held, "making decisions about the amount of restitution, the amount of installments, and their timing is a judicial function and therefore is non-delegable." *United States v. Johnson*, 48 F.3d 806, 809 (4th Cir. 1995). Although in *Weinberger v. United States* this court held that a district court does not abrogate its judicial authority under the VWPA "when it delegates the setting of a restitution-payment schedule to the defendant's probation officer," we also held that such delegation was only permissible *"provided that the court first establishes the amount of restitution."* *Weinberger v. United States*, 268 F.3d 346, 360 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 1433 (2002) (emphasis added) (quotation omitted).[14]

The district court in this case delegated the determination of the *amount* of Butler's restitution to the Tax

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[14] No circuit has held that determination of the amount of restitution is delegable. In accordance with the Fourth Circuit, the substantial majority of circuits has held that neither the amount of restitution nor the restitution-payment schedule may be delegated. *See United States v. Pandiello*, 184 F.3d 682, 688 (7th Cir. 1999); *United States v. Graham*, 72 F.3d 352, 356 (3d Cir. 1995), *cert. denied*, 516 U.S. 1183 (1996); *United States v. Porter*, 41 F.3d 68, 71 (2d Cir. 1994); *United States v. Albro*, 32 F.3d 173, 174 (5th Cir. 1994). Neither of the two other circuits to have held that a district court may delegate a defendant's restitution-payment schedule to the defendant's probation officer have held that a district court may delegate the amount of restitution. *See United States v. Fuentes*, 107 F.3d 1515, 1529 n.25 (11th Cir. 1997) (district court may delegate restitution-payment schedule to defendant's probation officer); *United States v. Barany*, 884 F.2d 1255, 1261 (9th Cir. 1989), *cert. denied*, 493 U.S. 1034 (1990) (district court may delegate timing and manner of restitution payments to defendant's probation officer, but court's failure to establish amount of restitution required remand).

Court or the IRS. Such delegation was impermissible as an abrogation of the court's judicial authority, and we conclude that it affected the fairness, integrity, and public reputation of judicial proceedings. *See United States v. Pandiello*, 184 F.3d 682, 688 (7th Cir. 1999). Therefore, the district court plainly erred in failing to determine the amount of Butler's restitution, and we vacate the restitution portion of Butler's sentence. In addition, we note that on remand, the district court must consider the following matters in determining the amount of restitution Butler should be required to make to the IRS. First, the district court did not explain its order of restitution in this case, but 18 U.S.C. § 3664 delineates a number of factors district courts "shall consider" in ordering restitution.[15] Thus, on remand, the district court must consider the factors and explain why they are or are not relevant. *See United States v. Meacham*, 27 F.3d 214, 219 (6th Cir. 1994) (remanding order of restitution for failure to consider factors set out in 18 U.S.C. § 3664). Second, in *Weinberger*, we held that "absent a specific provision in the plea agreement to pay full restitution pursuant to 18 U.S.C. § 3663(a)(3), the district court could only order restitution for the tax loss related to Count 12 [the count Weinberger

[15] 18 U.S.C. § 3664(a) (1994) provides that: "The court, in determining whether to order restitution under section 3663 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate."

pleaded guilty to]." *Weinberger*, 268 F.3d at 357-58[16]; *see also Comer*, 93 F.3d at 1278-79; *Gall*, 21 F.3d at 110. In this case, Butler's plea agreement does not contain any provision specifically discussing restitution. Therefore, the district court may only order Butler to make restitution to the IRS in an amount that does not exceed the tax loss related to Count 2 of the superseding indictment – $17,652.

III. CONCLUSION

For the above reasons, we **AFFIRM** the judgment of the district court, except we **VACATE** the district court's imposition of restitution and we **REMAND** for proceedings consistent with this opinion.

CONCURRENCE

R. GUY COLE, JR., Circuit Judge, concurring. I concur in the majority's opinion. I write separately to note that the record does not reveal why the district court chose to delegate the restitution amount to the IRS or tax court. Certainly, parties to a plea agreement may specify that the final restitution amount will be negotiated between the IRS and the defendant. *See United States v. Gottesman*, 122 F.3d 150, 151-52 (2d Cir. 1997); *United States v. Stout*, 32 F.3d 901, 904 (5th Cir. 1994). However, there is no clear

[16] 18 U.S.C. § 3663(a)(3) (1994) states that: "The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement."

indication that delegation was contemplated as part of the plea agreement in this case. Alternatively, the district court could simply have been unaware that delegation was impermissible. The parties registered no objection to delegation, and only after Butler had been sentenced did this Circuit suggest in binding precedent that delegation of the restitution amount could be plain error. *See Weinberger v. United States*, 268 F.3d 346, 359 (6th Cir. 2001).

If there were evidence that the parties had agreed to delegate restitution, or evidence that the defendant had affirmatively waived his right to have the restitution amount set by the court, I would be more hesitant to vacate the sentence. However, as this record does not present such evidence, I join the majority.

B.

99-3867

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov. 13, 2002

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BRADFORD LEE BUTLER, Defendant-Appellant.	)	ORDER

BEFORE: MOORE and COLE, Circuit Judges; and O'MEARA,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concluded that the issues raised in the

* Hon. John Corbett O'Meara, United States District Judge for the Eastern District of Michigan, sitting by designation.

petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF
THE COURT

/s/
Leonard Green, Clerk

C.

COUNT 2 OF THE ORIGINAL INDICTMENT

On or about the 31st day of January, 1992, in the Southern District of Ohio, KRISTON KENT MANNING and BRADFORD LEE BUTLER, JR., defendants, who conducted businesses known as National Consumer Research (hereinafter, "NCR") and Data Central that were established in Columbus, Ohio, and with business operations then in Columbus, Ohio, did willfully attempt to evade and defeat federal income taxes withheld from wages and Federal Insurance Contributions Act taxes due and owing to the United States of America for the quarter ending December 31, 1991, by failing to prepare and file with the Internal Revenue Service an Employer's Quarterly Federal Tax Return, Form 941, and by failing to pay the amount of federal income tax withheld and social security taxes due and owing, which was the total sum of $17,652, whereas KRISTON KENT MANNING and BRADFORD LEE BUTLER, JR., defendants, then and there well knew and believed that such sum was due and owing to the United States of America for the said quarter's employment taxes.

In violation of Title 26, United States Code, Section 7201.

D.

COUNT 2 OF THE SUPERSEDING INDICTMENT

On or about the 31st day of January, 1992, in the Southern District of Ohio, KRISTON KENT MANNING and BRADFORD LEE BUTLER, JR., defendants, who conducted businesses known as National Consumer Research (hereinafter, "NCR") and Fulfillment Services Corp. that were established in Columbus, Ohio, and with business operations then in Columbus, Ohio, did willfully attempt to evade and defeat federal income taxes withheld from wages and Federal Insurance Contributions Act taxes due and owing to the United States of America for the quarter ending December 31, 1991, by failing to file with the Internal Revenue Service an Employer's Quarterly Federal Tax Return, Form 941, and by failing to pay the amount of federal income tax withheld and social security taxes due and owing, which was the total sum of $17,652, whereas KRISTON KENT MANNING and BRADFORD LEE BUTLER, JR., defendants, then and there well knew and believed that such sum was due and owing to the United States of America for the said quarter's employment taxes.

In violation of Title 26, United States Code, Section 7201.

E.

SECTION 6531 OF THE INTERNAL REVENUE CODE

Periods of limitation on criminal prosecutions

No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years–

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;

(3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document);

(4) for the offense of willfully failing to pay any tax, or make any return (other than a return required under authority of part III of subchapter A of chapter 61) at the time or times required by law or regulations;

(5) for offenses described in sections 7206(1) and 7207 (relating to false statements and fraudulent documents);

(6) for the offense described in section 7212(a) (relating to intimidation of officers and employees of the United States);

(7) for offenses described in section 7214(a) committed by officers and employees of the United States; and

(8) for offenses arising under section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof.

The time during which the person committing any of the various offenses arising under the internal revenue laws is outside the United States or is a fugitive from justice within the meaning of section 3290 of Title 18 of the United States Code, shall not be taken as any part of the time limited by law for the commencement of such proceedings. (The preceding sentence shall also be deemed an amendment to section 3748(a) of the Internal Revenue Code of 1939, and shall apply in lieu of the sentence in section 3748(a) which relates to the time during which a person committing an offense is absent from the district wherein the same is committed, except that such amendment shall apply only if the period of limitations under section 3748 would, without the application of such amendment, expire more than 3 years after the date of enactment of this title, and except that such period shall not, with the application of this amendment, expire prior to the date which is 3 years after the date of enactment of this title.) Where a complaint is instituted before a

commissioner of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the commissioner of the United States. For the purpose of determining the periods of limitation on criminal prosecutions, the rules of section 6513 shall be applicable.

Supreme Court, U.S.
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No. 02-1185

In the Supreme Court of the United States

BRADFORD LEE BUTLER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the superseding indictment related back to the original indictment and so was timely.

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In the Supreme Court of the United States

No. 02-1185

BRADFORD LEE BUTLER, JR., PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 297 F.3d 505.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 2002. A petition for rehearing was denied on November 13, 2002 (Pet. App. 27a-28a). The petition for a writ of certiorari was filed on February 10, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Pursuant to a plea agreement, petitioner entered a conditional plea of guilty to Count 2 of the superseding indictment, which charged him with tax evasion, in violation of 26 U.S.C. 7201, with respect to employment taxes due for the quarter ending December 31, 1991. Pet. App. 2a, 6a. Petitioner reserved the right to

appeal from the district court's denial of his motion to dismiss the superseding indictment. *Id.* at 5a n.2. Petitioner was sentenced to 12 months' incarceration and ordered to pay restitution in an amount to be determined. *Id.* at 6a, 22a. The court of appeals affirmed the district court's judgment, except as to the amount of restitution, which it fixed at $17,652. *Id.* at 2a, 22a, 25a.

1. Petitioner and his business partner, Kriston Kent Manning, established and operated a business known as National Consumer Research (NCR), which collected consumer data for sale to consumer products companies. Pet. App. 3a. Petitioner also created shell corporations known as Data Central and Fulfillment Services Corporation (FSC). *Id.* at 19a; C.A. App. 185, 736. In the offense conduct to which he pleaded guilty, petitioner represented to the Internal Revenue Service that FSC leased its employees to NCR. NCR paid Data Central, and later FSC, sufficient funds to cover only the net amount of the checks that were paid the employees. The employment taxes withheld from the employees' wages were not paid over to the IRS, but were expended by and for petitioner. Petitioner also failed to file the required federal employment tax returns. Pet. App. 3a; C.A. App. 185.

2. On January 29, 1998, a federal grand jury in the Southern District of Ohio indicted petitioner on one count of conspiracy to impede or obstruct the IRS in ascertaining and collecting employment taxes, in violation of 18 U.S.C. 371, and five counts of employment tax evasion, in violation of 26 U.S.C. 7201.[1] Pet.

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[1] Manning was charged in the indictment with one count of conspiracy, 18 U.S.C. 371, and 12 counts of employment tax evasion, 26 U.S.C. 7201. Manning has fled the United States and remains a fugitive.

App. 3a; C.A. App. 16-27. On February 26, 1998, the same grand jury returned a superseding indictment. Pet. App. 3a; C.A. App. 28-39. The superseding indictment supplemented or replaced some references to "Data Central" with references to "FSC." That change reflected the fact that, in August 1991, Fulfillment Services Corporation replaced Data Central as the purported lessor in the tax evasion scheme. C.A. App. 31. The only change made to Count 2 replaced the single reference to "Data Central" with one to "Fulfillment Services Corporation." Pet. App. 9a.

On June 4, petitioner moved to dismiss the indictment for the government's breach of an alleged agreement not to prosecute; on the same day, he also moved to dismiss the indictment for lack of sufficient evidence to continue the prosecution; and, on July 29, he moved again to dismiss the indictment for unjustifiable delay in commencing prosecution. The July 29 motion argued that petitioner had been prejudiced by the government's delay in obtaining an indictment, but did not refer to the statute of limitations. C.A. App. 84-92. On September 15, the district court denied petitioner's motions to dismiss. Petitioner then entered a conditional plea of guilty to Count 2 of the superseding indictment, which charged him with willfully attempting to evade employment taxes due for the quarter ending December 31, 1991, in violation of 26 U.S.C. 7201. Pet. App. 4a-5a; C.A. App. 128-133. He reserved his right to appeal the denial of the motion to dismiss for breach of an agreement. C.A. App. 133.

3. On appeal, petitioner argued for the first time that the six-year statute of limitations period for prosecuting the tax evasion offense charged in Count 2 had run. The government argued that it had not because the original indictment was timely and the superseding

indictment related back to the original indictment. Petitioner maintained that the superseding indictment was untimely because it "impermissibly broaden[ed]" that count of the original indictment. Pet. C.A. Br. 36-38; Pet. C.A. Reply Br. 1-4. As relevant here, the court of appeals affirmed. It held that the statute of limitations began running, "at the very earliest, [on] January 31, 1992, * * * the date of the last affirmative act of evasion." Pet. App. 7a-8a. Thus, the original indictment was returned within the six years of the offense. The court further determined that:

> the only change to Count 2 between the original indictment and the superseding indictment was the substitution of FSC for another company, Data Central. This substitution simply constitutes "underlying detail"—both companies were alleged to have performed the same role in the tax evasion. Thus, [petitioner] clearly had notice of the charges against him in the first indictment.

Id. at 9a. Noting that circuit precedent provides that "a superseding indictment relates back to the date of the original indictment if it 'does not broaden the charges set forth' in the original indictment," *id.* at 8a (quoting *United States* v. *Garcia*, 268 F.3d 407, 411 (6th Cir. 2001), cert. denied, 535 U.S. 1089 (2002)), the court held that the superseding indictment here related back to the original indictment and was timely. *Id.* at 9a.

Petitioner filed a petition for rehearing, with suggestion for rehearing en banc, which was denied. In that petition, he suggested for the first time that the superseding indictment did not relate back because it had "substantially amended" the charge, even if it had not broadened it. C.A. Pet. for Reh'g 4-6.

ARGUMENT

Petitioner argues that the Sixth Circuit's standard for determining whether a superseding indictment relates back to the original indictment conflicts with the standard of eight other circuits. That claim lacks merit and does not warrant further review. First, not only did petitioner not present his current argument until his suggestion for rehearing en banc, he urged the court of appeals to apply the standard he now attacks. Second, there is no split among the circuits, as the variations in phrasing on which petitioner relies have not led to disparate outcomes. Third, the court of appeals correctly applied the established standard to this case.

1. Petitioner failed to present to the court of appeals the argument he now presses, and the court did not pass upon the question.[2] Petitioner's opening brief in the court of appeals stated simply that the statute of limitations began to run on December 31, 1991, and that more than six years had passed before the indictment was filed. Pet. C.A. Br. 36-38. The United States responded that the relevant date was January 31, 1992,

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[2] Petitioner also did not suggest at any time to the district court that the statute of limitations had run in this case, and did not reserve the right to appeal on that ground in his conditional guilty plea. The claim is therefore foreclosed by his plea, or, at most, is reviewable for plain error under Federal Rule of Criminal Procedure 52(b). Because the Sixth Circuit is one of the few federal appellate courts to hold that the statute of limitations may be freely raised for the first time on appeal, see *United States* v. *Crossley*, 224 F.3d 847, 857-858 (6th Cir. 2000) (discussing circuit precedent), the United States did not argue before the court of appeals that petitioner's failure to raise the issue in the district court, or to reserve the issue in his plea, constituted a forfeiture or waiver.

and that the superseding indictment related back to the original indictment. Resp. C.A. Br. 21-23. In his reply brief, petitioner said (correctly) that in *United States* v. *Smith*, 197 F.3d 225, 229 (1999), the Sixth Circuit endorsed the reasoning of *United States* v. *Grady*, 544 F.2d 598 (2d Cir. 1976), that a superseding indictment relates back unless it "impermissibly broadens" the original indictment. Pet. C.A. Reply Br. 1. Petitioner then said (incorrectly) that the facts of this case involved impermissible broadening. He did not distinguish between substantial amendment and impermissible broadening, nor did he advise the court of appeals that in his view it adhered to a minority standard.

The court of appeals then held that the substitution of FSC for Data Central in Count 2 constituted "underlying detail," since the two companies were alleged to have performed the same role in the tax evasion scheme; that petitioner "clearly had notice of the charges against him in the first indictment"; and that the "superseding indictment relate[d] back to the original indictment." Pet. App. 9a. Only in his petition for rehearing did petitioner argue that there was a relevant difference between broadening an indictment and amending it, and that this case involved the latter and not the former. C.A. Pet. for Reh'g 5-6 & n.6.

For that reason, the court of appeals never held that the relation-back doctrine applies where an indictment is not materially broadened but is substantially amended. The appellate panel had no occasion to consider that question, and it had no opportunity to consider whether this case involves such facts. Had petitioner presented his claim to the court of appeals in a timely fashion, the panel might well have made clear (as explained below) that there are no significant

differences among the standards applied by the circuits. For that reason, this Court should follow its well-established practice of denying review to claims that were neither pressed nor passed upon below. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

2. Petitioner errs in claiming that the relation-back standard applied by the court of appeals in this case is substantively different from the law of eight other circuits. Pet. 5-7. As the Second Circuit explained in the leading case of *Grady*, which pioneered the "broaden" or "amend" language, the key question is whether the defendant had fair notice from the original indictment of the charges against him. See 544 F.2d at 601 (identifying "timely notice * * * within the statutory time frame" as the underlying policy of statutes of limitations). Changes in small and insubstantial details do not deprive a defendant of fair notice. *Id.* at 603 ("[W]e find that the superseding and superseded indictments were in all respects substantially the same, and the defendants were placed fully upon notice of the crimes with which they were charged in the superseding indictment by virtue of the superseded indictment."). The principle that fair notice is the touchstone of relation-back analysis appears expressly in almost all the cases that petitioner cites (Pet. 5) in attempting to show a split among the circuits.[3]

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[3] See *United States* v. *O'Bryant*, 998 F.2d 21, 24 (1st Cir. 1993) (quoting *Grady*, *supra*, and citing *United States* v. *Lash*, 937 F.2d 1077 (6th Cir. 1991)); *United States* v. *Zvi*, 168 F.3d 49, 55 (2d Cir. 1999) (citing *Grady*); *United States* v. *Schmick*, 904 F.2d 936, 940 (5th Cir. 1990) (quoting *Grady*); *United States* v. *Ross*, 77 F.3d 1525, 1537 (7th Cir. 1996) (citing, *inter alia*, *Lash*); *United States* v.

That is the very reasoning that the Sixth Circuit adopted in *Smith*. 197 F.3d at 229 ("Notice to the defendants of the charges, so that they can adequately prepare their defense, is the touchstone in determining whether a superseding indictment has broadened the original indictment."). If a superseding indictment adds new charges of which the defendant had no fair notice before the running of the statute, the new charges are barred; but as to charges of which the defendant did have fair notice, the superseding indictment relates back and avoids the bar. That the Sixth Circuit refers to the addition of the new charges simply as "broadening," rather than as "broadening or amending," makes no significant difference.

Petitioner suggests that the difference is material because the Sixth Circuit would permit a superseding indictment to relate back if, for example, in a false statements case, one "alleged false statement to a government agency [were] substituted for another," Pet. 8-9, because that would amend but not broaden the indictment. The Sixth Circuit has not so held, however, and if that change truly subjected the defendant to a charge of which he had no prior notice, it would broaden

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Davis, 953 F.2d 1482, 1491 (10th Cir. 1992) (citing *Grady*); *United States* v. *Ratcliff*, 245 F.3d 1246, 1253 (11th Cir. 2001) (citing, *inter alia*, *Smith*, *supra*, and *Grady*); see also *United States* v. *Sears, Roebuck & Co.*, 785 F.2d 777, 779 (9th Cir. 1986) (per curiam) (citing *United States* v. *Friedman*, 649 F.2d 199 (3d Cir. 1981), which in turn cited *Grady*; and stating that "[t]he government from the outset made [the defendant] aware of its concern" about certain conduct). The one case on petitioner's list that does not itself discuss the importance of fair notice nevertheless does not support petitioner's claim of a circuit split. *United States* v. *Oliva*, 46 F.3d 320 (3d Cir. 1995), simply cited *Friedman* as having adopted the rule of *Grady*. *Oliva*, 46 F.3d at 324.

the indictment within the meaning of *Smith*. See 197 F.3d at 229; see also *United States* v. *Garcia*, 268 F.3d 407, 414 (6th Cir. 2001) (explaining that in *Smith* "the defendants had notice at all times of the charges against which they would have to defend themselves"), cert. denied, 535 U.S. 1089 (2002). Accordingly, there is no conflict worthy of this Court's review. Absent a claim that any other court of appeals has resolved a case that is factually similar to this one by ruling for the defendant, petitioner's claim raises only a semantic rather than a substantive issue.

3. In any event, the superseding indictment in this case did not broaden or amend the original indictment under any reasonable standard.

As the court of appeals noted, "the only change to Count 2 between the original indictment and the superseding indictment was the substitution of FSC for another company, Data Central." Pet. App. 9a. In each case, the charge merely alleged that the corporation was a business conducted by the defendant, that it was established in Columbus, Ohio, and that it had business operations there. As the court of appeals held, the corporate name was mere "underlying detail." *Ibid.*

The court also correctly held that the indictment gave defendant sufficient notice of the charge against him. Pet. App. 9a. Count 2 of the original indictment identified both the workers whose withheld employment tax was not paid over—the individuals who performed the business duties and functions of NCR—and the period for which the unpaid tax was due—the fourth quarter of 1991. *Id.* at 29a. Substituting one named corporation for another did not deprive

petitioner of timely, fair notice of the charges against him.[4]

b. Petitioner further states that had the Government proceeded on the original indictment, he "would have been entitled to a judgment of acquittal" on Count 2, because it named Data Central and not FSC, and there were at the relevant time "no Data Central employees as to whom petitioner could have failed to pay taxes." Pet. 12. Petitioner's claim that he would have been entitled to an acquittal is incorrect. The United States could have proved at trial the use of a different named corporation to accomplish the offense conduct of failing to pay employment taxes on those particular employees for that particular quarter, because a nonprejudicial variance between the indictment and the proof is permissible. The variance here would have affected neither petitioner's right to fair notice of the charges against him nor his right to protection from double jeopardy in future cases involving the failure to pay the same taxes. See *United States* v. *Miller*, 471 U.S. 130, 134-135 (1985) (noting that defendant was not "prejudicially surprised at trial," and that the indictment would serve "as a bar to subsequent prosecutions"); *Berger* v. *United States*, 295 U.S. 78, 82 (1935) (same).

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[4] Petitioner's claim that he was deprived of fair notice is further undermined by the original indictment's language in Count 1 charging as an overt act in furtherance of the conspiracy the failure to pay employment taxes for "NCR, Data Central, *or any other related business entity* responsible for so filing on behalf of employees who carried out business duties and functions of NCR." C.A. App. 19 (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

BRADFORD LEE BUTLER, JR.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

1. The Court of Appeals Specifically Said It Had Fully Considered the Issues Raised in Butler's Petition for Rehearing.

The government is mistaken in asserting (Opp. 5) that the Court of Appeals "did not pass upon" Butler's contention, advanced in his petition for rehearing with suggestion for rehearing en banc, that Count 2 of the superseding indictment was time-barred because it substantially amended the original charge, even if it did not broaden it. In denying rehearing, the Court of Appeals specifically stated:

> The panel has further reviewed the petition for rehearing and concluded that *the issues raised in the petition were fully considered upon the original submission and decision of the case.*

A. 27a-28a (emphasis added). That was an express confirmation that the court, which had directed the government to respond to the petition, had indeed considered the two issues that had been raised in the petition, the first of which (addressed in the first twelve and one-half pages of the petition) was whether Count 2 of the superseding indictment materially amended the charge—whether or not it broadened it—and therefore was barred by the statute of limitations. C.A. Pet. For Reh'g 1-13.

Moreover, it cannot be seriously questioned that the Sixth Circuit adheres to the rule that a superseding indictment relates back to the time of the original indictment if it does not materially broaden the charge. The Sixth Circuit has applied that rule in four published opinions. *See* Pet. 6. Just two days after Butler filed his petition for certiorari, the Sixth Circuit referred to the rule yet again, in an unpublished opinion. *See United States v. Crawford*, No. 01-1144, 2003

WL 343250, *8 (6th Cir. Feb. 12, 2003) ("A superseding indictment 'relates back' as long as it does not broaden the charges alleged in the previous indictment.").[1]

2. There is a Conflict in the Circuits.

Eight circuits have held that a superseding indictment relates back to the date of the original indictment if it neither substantially broadens nor substantially amends the original indictment. *See* Pet. 5-6. The Sixth Circuit has repeatedly held that a superseding indictment relates back to the date of the original indictment if it does not materially broaden the charges made in the original indictment. *See id.* 6. The government now seeks to make this conflict disappear by emphasizing that the Sixth Circuit, in common with the eight circuits that have applied a different standard, views fair notice to the defendant as the overarching concern in deciding the reach of the relation-back doctrine. Opp. 7-8. But fair notice is far too vague a concept to render insignificant the divergence in the standards applied by the circuits. It is no accident that in each of the four published opinions in which the Sixth Circuit has applied its unique standard, it has held that the superseding indictment related back. *See* cases cited at Pet. 6. In contrast, courts applying the majority rule have

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[1] The government takes issue with the Sixth Circuit's rule, which it notes few federal appellate courts subscribe to, that the statute of limitations may be freely raised for the first time on appeal. Opp. 5 n.2. But the division in the circuits on that question, *see United States v. Crossley*, 224 F.3d 847, 858 (6th Cir. 2000) (citing cases), is not a reason to deny certiorari. To the contrary, this case would be an appropriate vehicle for resolving that conflict as well. The question that that conflict concerns, like the question on which Butler has sought certiorari, is a basic and recurring issue of federal criminal procedure.

not infrequently rejected arguments by the government that a superseding indictment related back.[2]

3. Substituting One Alleged Employer for Another Was a Fundamental Change in the Charge.

The government's final argument is that the superseding indictment returned against Butler "did not broaden or amend the original indictment under any reasonable standard." Opp. 9. That argument is wide of the mark for two reasons.

First, if this Court ultimately agreed with Butler that the Court of Appeals had applied the wrong standard, it would ordinarily leave it to the Court of Appeals on remand to apply the correct standard to the facts.

Second, the government's suggestion that the superseding indictment did not materially amend the original indictment is untenable. The government is incorrect in stating that "Count 2 of the original indictment identified . . . the workers whose withheld employment tax was not paid over—the individuals who performed the business duties and functions of NCR . . . ." Opp. 9. There simply is no such identification anywhere in the original version of Count 2. A. 29a. Moreover, it is wholly implausible to suggest that a defendant is given fair notice, that he may face a charge in which one company (Fullfillment Services Corporation) is the alleged employer, by a charge that presupposed that an entirely different company (Data Central) was the employer. The identity of the alleged employer is a critical fact in a charge of nonpayment of employment tax.[3]

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[2] *See, e.g., United States v. Ratcliff*, 245 F.3d 1246, 1253 (11th Cir. 2001); *United States v. Zvi*, 168 F.3d 49, 54-55 (2d Cir. 1999); *United States v. O'Neill*, 463 F. Supp. 1205, 1207 (E.D. Pa. 1979).

[3] The government is mistaken in assuming (Opp. 10) that proof of the use of a different corporation than the one named in the charge would have been a mere variance. It would have been a sufficiently important

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, certiorari should be granted.

Respectfully submitted,

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change to constitute a constructive amendment. *See Stirone v. United States*, 361 U.S. 212, 217 (1960). Surely the government would not view an acquittal on a charge of nonpayment of employment tax due with respect to the employees of one company as a bar to later prosecution for nonpayment of employment tax due with respect to the employees of a different company.

United States v. Miller, 471 U.S. 130 (1985), upon which the government relies (Opp. 10), involved the completely different situation of a superseding indictment that simply omitted material that had been included in the original indictment, *without adding anything*. *Berger v. United States*, 295 U.S. 78 (1935), likewise does not support the government's position. In that case, there was no contention that the evidence proved an offense different from the one charged. *See id.* at 81. Instead, the defendant's contention was that "the proof includes more." *Id.* In the hypothetical posed by the government here, the evidence would have proved an offense different from the one charged.